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COURT OF APPEALS
DIVISION II

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NO. 34125-5-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DEPUTY

STATE OF WASHINGTON, Respondent

v.

JACOB GAMBLE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JAMES E. RULLI
CLARK COUNTY SUPERIOR COURT CAUSE NO. 99-1-00537-6

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

This particular case has been in the appellate system for quite a number of years. The State Supreme Court set forth the factual scenario in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). Statement of the case is as follows:

On March 26, 1999, 19-year-old Jacob Gamble attended a party at a neighbor's house. By 11:30 pm, over 50 individuals were at the party, most drinking alcohol or smoking marijuana. Gamble's friend, Kevin Phommahasay expressed an intent to confront and fight Curtis Esteban that night. When Esteban, along with his friend Daniel Carroll, arrived at the party, Phommahasay immediately went outside to confront Esteban and struck him in the head with a beer bottle. At that time, Gamble struck Carroll in the face, knocking him to the ground. Carroll hit his head on the ground and was rendered unconscious. Gamble and Ryan May then began to kick and stomp on Carroll. Carroll died of blunt head trauma.

The State charged Gamble with first degree felony murder with robbery as the predicate felony and, alternatively, with second degree felony murder with second degree assault as the predicate felony. At trial, Gamble requested the court instruct the jury [***3] on the offense of first degree manslaughter as a lesser included offense to the charge of second degree felony murder. The trial court denied Gamble's proposed instruction, ruling manslaughter is not a lesser included offense of felony murder. A jury convicted Gamble on both felony murder charges. Gamble appealed. n1

----- Footnotes -----

n1 In an unpublished opinion, the Court of Appeals reversed the first degree felony murder conviction, concluding that there was insufficient evidence to support the conviction. State v. Gamble, noted at 116 Wn.App. 1016, 2003 WL 1298906, at **2-3. This reversal is not before the court.

----- End Footnotes -----

In relation to the second degree felony murder conviction, Gamble asserted that the trial court erred in failing to instruct the jury on manslaughter. Gamble argued that [*461] the lesser included offense test, as set for the in State v. Berlin, 133 Wn.2d 541, 545-46, 550, 947 P.2d 700 (1997), completed a finding that manslaughter is a lesser included offense in this case. During the pendency [***4] of his appeal, this court decided In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), (holding assault cannot serve as predicate felony for felony murder) and the Court of Appeals solicited additional briefing on its impact. Gamble, 2003 WL 1298906, *6. In response to this request, in a reverse course from his earlier position, Gamble conceded in his supplemental briefing that Washington law does not provide for lesser included offenses to second degree felony murder. See Appellant's Second Suppl. Br. At 6 (noting appellant "is not allowed access to such lesser included-offenses [as manslaughter] if Felony Murder in the Second Degree is charged") (citing State v. Tamalini, 134 Wn.2d 725, 747, 953 P.2d 450 (1998)). The State consistently [**648] maintained, at trial and on appeal, that manslaughter is not, and cannot be, a lesser included offense of felony murder.

- Gamble, 154 Wn.2d at 4610-461

II. RESPONSE TO ASSIGNMENT OF ERROR #1

The first assignment of error raised by the appellant is a claim that retrial constitutes double jeopardy. The argument being made, appears to be, that the defendant has already been convicted of and punished for this homicide. It is true that the defendant was first convicted of murder in the first degree. That conviction was reversed for insufficient evidence. It is also true that a felony murder conviction was reversed because of the decision In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The matter was delayed for purposes of retrial after the Andress decision came down because the parties sought clarification in the State Supreme Court. That clarification was provided and this matter was again in the Superior Court for retrial. The matters previously indicated were not acquittals, but were reversals in the appellate system.

A conviction does not necessarily act as a bar to a second prosecution for the same offense: "It is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." United States v. Ball, 163 U.S. 662, 672, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). In State v. Wright,

131 Wn.App. 474, 127 P.3d 742 (2006) the defense attempted to raise double jeopardy because there was a reversal of his first conviction based on the Andress decision. The State attempted to retry the defendant for second degree intentional murder which was dismissed on double jeopardy grounds unique to that case's facts. On review, the court found that the charge of intentional murder was left undecided in the first trial because neither the State nor defendant asked to have it submitted in the instructions to the jury. The court held that because the defendant had not been acquitted of the murder, and he had obtained a reversal of his first conviction for reason other than insufficient evidence, he remained in the same jeopardy that attached during the first trial.

In summary, Wright has never been acquitted, not even implicitly, for the 1993 murder. Now that he has obtained vacation of his second degree murder conviction, based upon that killing, traditional double jeopardy analysis holds that the slate is wiped clean. The State may try again to establish his culpability. Under the double jeopardy clause, the State's failure to request an intentional murder instruction in Wright's 1993 trial has no effect on the State's ability to proceed on that alternative now.

- State v. Wright, 131 Wn.App. at 486-487.

The State submits that there has been nothing shown to deviate from the general rule that jeopardy terminates with a

conviction that becomes unconditionally final, but not with a conviction that the defendant successfully appeals. Ludwig v. Massachusetts, 427 U.S. 618, 631-632, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976). The United States Supreme Court has expressly rejected the view that the double jeopardy provision prevents a second trial when a conviction has been set aside. Instead, it has formulated a concept of continuing jeopardy when criminal proceedings against an accused have not run their full course. Tibbs v. Florida, 457 U.S. 31, 40, 102 S.Ct. 2211, 32 L.Ed.2d 652 (1982); Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757 26 L.Ed.2d 300 (1970); State v. Corredo, 81 Wn.App. 640, 915 P.2d 1121 (1996).

The State submits that there has been no showing of a violation of the double jeopardy provisions.

III. RESPONSE TO ASSIGNMENT OF ERROR #2

The second claim of assignment of error raised by the defendant is that the trial court violated the mandatory joinder rule by allowing this trial to proceed.

The State argued, and the trial court accepted, the claim that mandatory joinder did not apply because of the extraordinary circumstances in this case.

The mandatory joinder rule is set out in CrR 4.3.1. That rule requires that related offenses must be joined for trial. A defendant who has once been tried for one offense may move to dismiss a later charge for a related offense, and the motion must be granted unless the court finds “that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.” Cr.R. 4.3.1(b)(3).

The appellate courts have determined that there are extraordinary circumstances present as a result of the Andress decision filed by the Washington State Supreme Court. In Andress, the Washington Supreme Court held that assault could not serve as the predicate crime for felony murder. In State v. Ramos, 124 Wn.App. 334, 101 P.3d 872 (2004), the issue was whether the State could institute proceedings on remand. Double jeopardy had prohibited retrial on the original charges. The State conceded the proposed manslaughter charges were related to the felony murder charges, but maintained the ends of justice exception to the mandatory joinder rule applied. The argument

was that the State was not negligent in failing to charge a related crime or that the State had engaged in any type of harassment tactics. The fact that the conviction had to be vacated was the result of extraordinary circumstances outside of the State's control.

In Ramos, Division I enters into a discussion concerning the fact that you had almost three decades of case law supporting the assault as the predicate felony in a murder case. When the Supreme Court reversed course, this led to an extraordinary circumstance.

For the court to abandon an unbroken line of precedent on a question of statutory construction after more than twenty-five years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of Ramos and Medina. This is not a case in which the State negligently failed to charge a related crime or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

- Ramos, 124 Wn.App. at 342.

In the State v. Wright, 131 Wn.App. 474, 127 P.3d 742 (2006) the appellate court similarly rejected the defendant's claims under the mandatory joinder rule. (Wright, at 487-488)

The trial court, in our situation, addressed both double jeopardy and the mandatory joinder issues at pretrial motions made by the defense. The trial court followed the reasoning in Ramos and the other cases cited and also found that there were extraordinary circumstances here that warranted retrial. (RP 31-33)

IV. RESPONSE TO ASSIGNMENT OF ERROR #3

The third assignment of error raised by the defendant is that he should have been allowed instructions on manslaughter in the second degree. The trial court found that there was no evidence to support that the defendant acted in a negligent manner when he assisted in causing the death of the victim. (RP 1404-1406). As the defendant has set forth in his statement of the case, and also in the body of the brief, the defendant gave a statement to the police, which was played for the jury, in which he indicated that he got caught up in the moment and intentionally punched the victim, a person he did not know. (RP 1193-1211). He said that he kicked the victim one time on the left side of his head when he was already on the ground. Throughout the statement that he gave to the police, which was played for the jury, the defendant

acknowledged that this was an intentional act but that he was just caught up in the moment.

Manslaughter in the First Degree requires the element of "recklessness" while Manslaughter in the Second Degree requires the element of "criminal negligence".

"Recklessness" is defined in RCW 9A.08.010(1)(c) as:

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

"Criminal negligence" is defined in RCW 9A.08.010(1)(d)

as:

A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk consists a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

This distinguish between the two degrees of manslaughter is discussed in 2 C. Torcia, Wharton on criminal law §168, at 272 (14 Ed. 1979):

The difference between the terms "recklessly" and "negligently", ... is one of kind, rather than of degree. Each actor creates a risk of harm. The reckless actor is aware of the risk and disregards it;

the negligent actor is not aware of the risk but should have been aware of it.

The question in our case is whether there is sufficient evidence to require an instruction on second degree manslaughter. There must be evidence in the record which will support an inference that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). The evidence must be of a nature to convince a reasonable person that the lesser offense occurred. State v. Jimerson, 27 Wn.App. 415, 618 P.2d 1027 (1980). If there is insufficient evidence to sustain the jury in finding the lower charge, no instruction should be given. State v. Moore, 61 Wn.2d 165, 172, 377 P.2d 456 (1963).

The State submits that the record in the case simply does not contain substantial evidence in support of the requested instruction. All information supplied to this jury would clearly indicate that this was intentional assaultive behavior by the defendant. This is not a situation of a negligent act but reckless conduct. In that regard than he would be entitled to an instruction on second degree manslaughter only if the record contained evidence that would support a conviction on that lesser crime. State v. Strand, 20 Wn.App. 768, 582 P.2d 874 (1978). The trial

court could not find evidence of a negligent act and properly refused the instructions. An instruction on a lesser included or an inferior degree offense is appropriate if the evidence permits a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). The evidence must affirmatively establish the defendant's theory of the case on the lesser offense. State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); State v. Charles, 126 Wn.2d 353, 355, 895 P.2d 558 (1995).

To satisfy the second Workman requirement (the factual prong), there must be a factual showing more particularized than the sufficient evidence already required for other jury instructions. Specifically, the appellate court has held that the evidence must raise an inference that *only* the lesser included offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455; State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990).

The proponent for the lesser instruction must establish that there is evidence to support the giving of that instruction. This must meet not only the legal requirement but the factual requirement as well. State v. McDonald, 123 Wn.App. 85, 88, 96

P.3d 468 (2004). If both prongs are not met, the lesser instruction is not to be given to the jury. That was the situation faced in this particular case. The defendant has acknowledged that what he did was an intentional act. He admittedly struck an individual he did not know and then when the person was down he kicked him in the head. The State submits that this cannot constitute negligent acts on the part of an individual. This conduct clearly shows a reckless disregard for the consequences of the intentional acts.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 18 day of August, 2006.

Respectfully submitted:

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DIVISION II

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Appellant.

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Clark Co. No. 99-1-00537-6

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON
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DIVISION II

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On August 18, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Lisa E. Tabbut Attorney at Law 1402 Broadway Longview, WA 98632
	Jacob Gamble, DOC #806775 Stafford Creek Correction Center 191 Constantine Way Aberdeen, WA 98520	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
Date: August 18, 2006.
Place: Vancouver, Washington.